

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAMES M. NIELSEN, M.D.,

Plaintiff,

v.

ALCON, INC. and ALCON
LABORATORIES, INC.,

Defendants.

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CIVIL ACTION NO. 3:08-CV-2239-B

**ORDER OVERRULING DEFENDANTS' OBJECTIONS AND ADOPTING THE
MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION**

Before the Court are the Magistrate Judge's Findings and Recommendation ("F&R") on the parties' cross motions for summary judgment filed September 2, 2011 (doc. 192), and Defendants Alcon, Inc.'s and Alcon Laboratories, Inc.'s ("Alcon") Objections filed September 16, 2011 (doc. 195). The F&R recommends that Defendants' Motion for Summary Judgment filed January 24, 2011 (doc. 180) and Plaintiff's James M. Nielsen, M.D.'s ("Nielsen") Cross Motion for Partial Summary Judgment filed February 24, 2011 (doc. 182) both be denied. Alcon's Objections dispute several of the Magistrate's findings and argue that the Magistrate improperly recommended denial of Alcon's Motion for Summary Judgment based on the errors identified in the Objections. After conducting a *de novo* review pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b) of the pleadings, files and records in this case as well as the F&R, Alcon's Objections, and Nielsen's response to these objections, the Court is of the opinion that the Findings and Recommendation are correct and Defendants' Objections should be overruled.

Regarding Alcon's Objections 1-3, the Court finds that the portions of the F&R objected to

are merely summaries or dicta not necessary to the Magistrate's Findings. The Court also finds that these findings objected to are not erroneous. Accordingly, Objections 1, 2, and 3 are hereby **OVERRULED**. To the extent that Alcon seeks to exclude the testimony and findings of Nielsen's expert Dr. Duncan Moore ("Dr. Moore") as inadmissible under Federal Rule of Civil Procedure 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related Fifth Circuit law, the Court agrees with the Magistrate Judge's finding that Nielsen has produced sufficient evidence at the summary judgment stage to meet his burden of showing that the methodology employed by Dr. Moore was reliable.¹ Given that Nielsen has met his burden of showing that Dr. Moore's methodology was reliable, both Alcon's objections to Dr. Moore's testimony and its objections to Magistrate Judge's findings that genuine issues of material fact exist based on this testimony are overruled. Accordingly, Objections 4, 5, 6, 7, and 8 are hereby **OVERRULED**.

Further, the Court finds that, based on the parties' summary judgment evidence, there are genuine issues of material fact regarding 1) when Nielsen conceived his invention, 2) when Nielsen reduced his invention to practice, 3) whether Nielsen acted diligently in reducing his invention to practice, and 4) whether Nielsen's patent should be invalid due to anticipation, obviousness, or lack of a written description.² Accordingly, Objections 9, 10, 12, 13, 14, and 15 are hereby **OVERRULED**. The Court also agrees with the Magistrate's finding that laches, estoppel, and failure to mark are more appropriate for trial given that they relate to the issue of damages and liability is

¹The Court expresses no opinion as to whether Dr. Moore's reports and testimony would be admissible at trial.

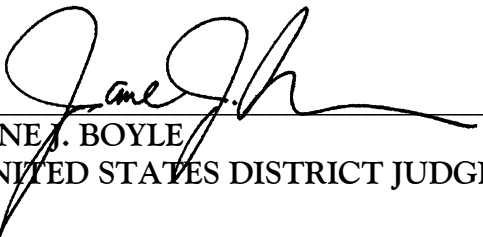
²The Court also overrules Alcon's Objection 11, which objects to the Magistrate Judge's finding that Nielson's attorney was a proper custodian under Federal Rule of Civil Procedure 803(6) for the reasons stated by the Magistrate Judge. See F&R 20-21.

in dispute.³ Accordingly, Objection 16 is **OVERRULED**.

Overall, the Court finds that the Magistrate Judge correctly found that the parties' summary judgment evidence raised a genuine issue of material fact regarding Alcon's alleged infringement of Nielsen's patent and Alcon's defenses.⁴ It is therefore **ORDERED** that Defendants' Objections are **OVERRULED** and the Findings and Recommendation of the United States Magistrate Judge are hereby **ADOPTED**. The parties' cross motions for summary judgment are **DENIED** for the reasons stated in the Magistrate Judge's Findings and Recommendation.

SO ORDERED.

Dated: September 30, 2011.



JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

³ Alcon may move to bifurcate trial on the issues of liability and damage at a later time.

⁴The Court notes that many of Alcon's objections to the evidence relied upon by the Magistrate Judge in his various findings go more to the *weight* of this evidence rather than whether such evidence is admissible for summary judgment purposes.